

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER**

MINUTE ORDER

Date: 05/11/2010

Time: 10:15:00 AM

Dept: C20

Judicial Officer Presiding: David Chaffee

Clerk: Cora Bolisay

Reporter/ERM:

Bailiff/Court Attendant: M Aguilar

Case No: **30-2009-00298887-CU-MC-CJC** Case Init. Date: 09/01/2009

Case Title: **City of Lake Forest vs. Moen**

Case Category: Civil - Unlimited

Case Type: Misc Complaints - Other

EVENT ID/DOCUMENT ID: 70979140

EVENT TYPE: Chambers Work

APPEARANCES

There are no appearances by any party.

City of Lake Forest v. Moen, et al

Case No. 30-2009-00298887 (and Consolidated Case Nos. 30-2009-00298892, 30-2990-00310517, 30-2009-00313523, 30-2009-00324525)

The matter of the Application(s) for Preliminary Injunction against Defendants having been argued and submitted, the Court now rules and orders as follows:

Lake Forest Municipal Code Sec. 5.02.040 provides that "notwithstanding any provision in this Code to the contrary, any use of land, operation, or business that is in violation of State and/or Federal law shall be prohibited in all planning areas, districts, or zones within the City." Gov. Code Sec. 37100 provides that a city's "legislative body may pass ordinances not in conflict with the Constitution and laws of the State or the United States." Stated in the negative, Section 37100 serves as a bar to local government's enacting ordinances that would serve to allow residents or businesses to violate state or federal law.

The Controlled Substances Act ("CSA") classifies marijuana as a Schedule I "controlled substance" and prohibits the use of this drug for any purpose. 21 U.S.C. Sec. 801, et seq. The United States Supreme Court has clearly stated that the use of marijuana is illegal; thereby affirming that there is no exception for medicinal use under California law. *Gonzales v. Raich* (2005) 545 U.S. 1, 27. Moreover, any person using marijuana for medical purposes in California can be criminally prosecuted under federal law. "The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Id.* Unless and until Congress chooses to declassify this drug as a Schedule I narcotic, the substance remains illegal throughout the United States.

Our Supreme Court has recognized this principle in *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 932, when it stated that despite the passage of California's Compassionate Use

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Act ("CUA") marijuana was not a legal prescription drug because "[no] state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law, even for medical users..."

In the instant matter the City of Lake Forest has not, and cannot promulgate code or zoning regulations allowing the use, sale or distribution of marijuana. Illegal activities under state or federal law are necessarily precluded from inclusion in the City's Municipal Code pursuant to LFMC Sec. 5.02.040 and Gov. Code Sec. 37100. To allow or require the operation of businesses that engage in the sale of substances made illegal under federal law as Schedule I drugs flies in the face of long standing principles of federal law supremacy as provided by the Constitution. U.S. Constitution, Article VI, Clause 2.

Defendant dispensaries are each within specified zoning districts. A business must conduct itself and/or operate in compliance with all provisions of the City's Municipal Code including its zoning code. See, LFMC Sec. 9.04.020. Defendant Earth Cann is located within the Pacific Commercentre, a project/area subject to regulations pertaining to planned communities within the City. LFMC Sec. 9.112.110, including the Pacific Commercentre Business Park Regulations. Any violations of these regulations constitute a violation of the LFMC. LFMC Secs. 9.04.020(E), 9.112.040. The Business Park zoning district also includes "Uses Subject To Use Permit Approved By the Zoning Administrator." The conditional uses listed in the Regulations do not include marijuana dispensaries as a temporary use; in fact marijuana dispensaries are not an enumerated use of any kind in the Business Park zoning district where Earth Cann is located. It follows that the operation of Earth Cann is a violation of the Pacific Commercentre Business Park Regulations and the LFMC.

The same analysis applies to the other dispensaries located within the Foothill Ranch Planned Community Regulations and Development Plan; specifically in the Commercial Community zoning district. The LFMC lists all principal uses permitted subject to a site development permit in the Commercial Community zoning district. Marijuana dispensaries are not listed as a permissible use. LFMC Sec. 9.88.20. The conditional uses listed in the LFMC do not include dispensaries. Id. Prohibited Uses are enumerated in the Code including uses not permitted by Sections 9.88.020 – 9.88.060(A)-(H). Since dispensaries are not a permissible use or a conditional or temporary use, the LFMC prohibits any such unmentioned use. Id. The operation by the other defendants to sell and distribute marijuana constitutes an illegal use.

Neither the CUA nor the Medical Marijuana Program Act ("MMP;" H&S Code Sec. 11362.7) restricts a city's power to enact land use or zoning laws affecting medical marijuana dispensaries, nor do they limit a city's ability to enforce existing local laws against such businesses. See, City of Claremont v. Kruse (2009) 177 Cal.App.4th 1153; City of Corona v. Nauls (2008) 166 Cal.App.4th 418. Defendants urge that any direct or indirect Municipal Code proscription of medical marijuana dispensaries is preempted by state law. As noted by the Court of Appeal in Kruse, "the CUA (Compassionate Use Act) expressly states that it does not supersede laws that protect individual and public safety: 'Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others...' The CUA, by its terms, accordingly did not supersede the City's moratorium on medical marijuana dispensaries..." 177 Cal.App.4th at 1173. The Court made clear that "[n]othing in the text or history of the CUA suggests it was intended to address local land use determinations or business licensing issues." Id. at 1175.

Although the city of Lake Forest has no business license requirement or a moratorium regarding marijuana dispensaries, Defendants' dispensaries are not enumerated in the applicable zoning regulations. Like the dispensaries in Nauls and Kruse, the operation of these dispensaries must be enjoined.

Defendants assert that because the LFMC does not have an explicit business license requirement, that Defendants' dispensaries are not violation of the LFMC. A city may utilize an array of measures to assure that businesses are properly operating within its limits. The City of Lake Forest has created such a zoning scheme. City of Claremont v. Kruse, supra at 1169. The holding of Kruse turned on the illegality

of the dispensary itself; not on the nominal business license issue. Such zoning scheme effectively regulates what is and is not allowed in the City of Lake Forest, thereby obviating the need for a business license requirement.

The LFMC provides that if a use is not deemed permitted it is thereby deemed included in the list of prohibited uses. LFMC Secs. 9.88.010 – 9.88.060(H). The City has declared that any violation of the LFMC is a public nuisance. LFMC Sec. 6.14.002(A). The Zoning Code describes public nuisances as "any use of property contrary to the provisions of the Zoning Code. LFMC Sec. 9.208.040(B)(1). Consequently, the continued illegal operation of the Defendant dispensaries within the City constitutes a public nuisance per se. LFMC Secs. 6.14.002(A), 9.208.040(B)(1), Foothill Ranch Planned Community Sec. X. Acts or conduct that qualify as public nuisances may be enjoined as "civil wrongs" due to "their inherent tendency to injure or interfere with the community's exercise and enjoyment of rights common to the public." *People ex rel Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1108-09; see also, *In re Englebrecht* (1998) 67 Cal.App.4th 486, 492.

For nuisance per se "no proof is required, beyond the actual fact of their existence, to establish the nuisance. No ill effects need be proved." *City of Claremont v. Kruse*, supra at 1166. Pursuant to LFMC Sec. 1.01.240(b), Defendants' marijuana distribution is a nuisance per se and must be enjoined.

Plaintiff's motions for preliminary injunctions to enjoin Defendants from conducting activities or operations related to Defendants' distribution of marijuana are granted. Defendants are ordered barred from conducting, allowing, permitting, inhabiting, leasing, renting, or otherwise using or granting authority to use said properties in the above described manner.

Court orders clerk to give notice.

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE, CENTRAL JUSTICE CENTER**

<p>CITY OF LAKE FOREST</p> <p style="text-align: center;">Plaintiff(s)</p> <p style="text-align: center;">Vs.</p> <p>MOEN</p> <p style="text-align: center;">Defendant(s)</p>	CASE NUMBER: 30-09-298887
	CERTIFICATE OF SERVICE BY MAIL OF MINUTE ORDER, DATED 5/11/2010

I, ALAN CARLSON, Executive Officer and Clerk of the Superior Court, in and for the County of Orange, State of California, hereby certify; that I am not a party to the within action or proceeding; that on 5/11/2010, I served the minute order, dated 5/11/2010, on each of the parties herein named by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Postal Service mail box at Santa Ana, California addressed as follows:

PLEASE SEE THE ATTACHED SERVICE LISTS

ALAN CARLSON,
Executive Officer and Clerk of the Superior Court
In and for the County of Orange

DATED: 5/11/2010

By: 

CORA D. BOLISAY, Deputy Clerk

CERTIFICATE OF SERVICE BY MAIL

#30-2009-298887

CITY OF LAKE FOREST VS. MOEN

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CITY OF LAKE FOREST VS MOEN

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